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Air Easement: Oklahoma Adopts the Trespass-Nuisance Dichotomy

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AIR EASEMENT: OKLAHOMA ADOPTS THE TRESPASS-NUISANCE DICHOTOMY

In a case of first impression, the Oklahoma Supreme Court in *Henthorn v. Oklahoma City* held that the ultimate issue in determining a landowner's right to recover for the taking of an air easement was whether the interference with the use and enjoyment of the land by low flying airplanes was so substantial as to constitute a "taking."[1] Plaintiff, appealing from an adverse jury verdict, contended that it was error for the trial court to have submitted the question of a "taking" to the jury where the uncontroverted evidence established daily, frequent and continuous jet aircraft flights over his land at altitudes of *less* than 500 feet.[2] In rejecting this contention, the court held that the gravamen of the action is *"whether there was an interference with the use and enjoyment of the land,* due to the low, frequent, continuous overflights of jet aircraft." (court's emphasis)[3]

The rule adopted by the Oklahoma Supreme Court accords with the landmark case *United States v. Causby*[4] which represents a unique combination of nuisance and trespass law.[5] *Causby* involved continuous overflights by military aircraft sixty feet above plaintiff's chicken farm. The lights, noise, glare and danger of accidents had made the plaintiff's premises uninhabitable and resulted in the destruction of his chickens. The Court held that the landowner had exclusive control of the superadjacent airspace.

> [I]f the landowner is to have full enjoyment of the land, he must have exclusive control of the immediate reaches of the enveloping atmosphere . . . The landowner owns at least as much of the space above the ground as he can occupy or use in connection with the land. . . . The superadjacent airspace

[1] 453 P.2d 1013 (Okla. 1969).
[2] *Id.* at 1015.
[3] *Id.* at 1016.

> at this low altitude is so close to the land that continuous invasions of it affect the use of the surface of the land itself. We think the landowner, as an incident to his ownership, has a claim to it and that invasions of it are in the same category as invasions of the surface.[6]

At first impression, the Court appears to be establishing a trespass theory of recovery. Under traditional common law concepts, a showing of damage was not necessary in a trespass action because a cause of action could sound on a "technical trespass." Furthermore, "he who owned the soil owned it to the heavens." However, the Court clearly rejects both of these concepts by stating:

> The airplane is part of the modern environment of life, and the inconveniences which it causes are normally not compensable under the Fifth Amendment. The airspace, apart from the immediate reaches above the land, is part of the public domain. We need not determine at this time what those precise limits are. *Flights over private land are not a taking, unless they are so low and so frequent as to be a direct and immediate interference with the enjoyment and use of the land.*[7] (emphasis added)

Therefore, the Court reasoned that isolated invasions of the superadjacent airspace are privileged. The Court is thereby inferentially using nuisance law to formulate a concept of a privileged trespass.

Traditionally, nuisances created by governmental activity were referred to as incidental damages not rising to the dignity of a "taking" required by the Fifth Amendment. It is interesting to note that approximately half of the state con-

[4] 328 U.S. 256 (1946).

[5] Munro, *Aircraft Noise as a Taking of Property,* 13 N.Y.L.F. 476 (1967).

[6] 328 U.S. at 264-65.

[7] *Id.* at 266.

stitutions, including Oklahoma, require compensation for a "taking or damaging."[8] The difference is significant. The Supreme Court stated in *United States v. Willow River Power Co.*: "[D]amage alone gives courts no power to require compensation where there is not an actual taking of property."[9] What is required is a direct, permanent, physical invasion amounting to appropriation and not mere injury.[10] Damage, however, is a completely different concept and indicates a "purpose not to confine recovery to cases where there is physical invasion of property affected."[11] Recovery is authorized under the Oklahoma Constitution "although there is no physical invasion or property damage . . . [and although] damage is temporary."[12]

The *Causby* court, therefore, was consistent with the traditional concept of a "taking" by requiring a direct physical invasion. However, in view of the court's added requirement of measuring the degree of interference on a case-by-case basis, one could conclude that the physical invasion requirement is irrelevant. The problem has been accentuated by modern technology. It is the noise, smoke and vibrations which destroy the use of property and not the passage through a narrow airspace by the physical corpus of the plane. The significant factor is the end result, interference with property use, and not the particular location of the agent. As shall be later discussed, this appears to be the attitude of the Oklahoma Court in *Henthorn* although this issue was not directly decided by the court.

[8] OKLA. CONST. art. 2, § 24 states in part: Private property shall not be taken *or damaged* for public use without just compensation. (emphasis added)

[9] 324 U.S. 499, 510 (1945).

[10] Sanguinetti v. United States, 264 U.S. 146 (1924).

[11] Stedman v. State Highway Comm'n, 174 Okla. 308, 50 P.2d 657 (1935).

[12] Chicago, R.I. & P. Ry. Co. v. Prigmore, 180 Okla. 124, 68 P.2d 90, 91 (1937).

Causby left unanswered the question of whether flights above five hundred feet or flights adjacent to plaintiff's property could ever constitute a "taking". However, *Causby* has been narrowly construed by some courts to require an actual physical trespass through the above column of air before recovery will be allowed.[13] Smoke, noise and vibrations are not physical invasions but mere inconveniences.[14] Completely ignored by these opinions are cases which hold that sound waves or shock waves from blasting constitute a physical invasion because they set in motion destructive forces.

In this writer's opinion, the courts which rigidly adhere to the rule requiring a physical invasion of the superadjacent airspace are attempting to foster a public policy of protecting the development of aviation. In view of present adverse public opinion concerning the environmental effects of aviation, it is not surprising to see a new line of cases, although a distinct minority, being based on a nuisance theory which provides a landowner protection against any unreasonable interference with the use of his land. The development of the nuisance theory of recovery has not been widespread because the action has traditionally been tied to injunctive relief which often ran counter to public interest in fostering the growth of aviation. This balancing of competing interests has produced cases like *Richards v. Washington Terminal Co.* which declared certain noxious activities of a railroad as a "legalized public nuisance."[15]

In *Henthorn v. Oklahoma City,* the court has apparently rejected the requirement of a direct physical invasion of the airspace. Although this precise issue was not in question, the

[13] Avery v. United States, 330 F.2d 640 (Ct. Cl. 1964). For a state case, *see* Ferguson v. City of Keene, 238 A.2d 1 (N.H. 1968).

[14] Freeman v. United States, 167 F. Supp. 541 (W.D. Okla. 1958).

[15] 233 U.S. 546 (1914); *cf.* Swetland v. Curtiss Airports Corp., 55 F.2d 201 (6th Cir. 1932).

court cited with approval the following authorities which rely on a nuisance theory of recovery: *Thornburg v. Port of Portland,*[16] Judge Murrah's dissent in *Batten v. United States,*[17] and the Restatement of Torts.[18]

In *Thornburg,* the court was faced with an inverse condemnation action in which it was alleged that systematic flights adjacent to plaintiff's land constituted a continuing nuisance resulting in a compensable "taking" under the Oregon Constitution. The court held that *Causby,* which required a showing of physical invasion, did not foreclose an inquiry into whether repeated nuisances could constitute a "taking". The court stated:

> [T]here is a question, in each case, as a matter of fact, whether or not the governmental activity complained of has resulted in so substantial an interference with use and enjoyment of one's land as to amount to a taking of private property for public use. This factual question, again barring some rule which says we may not ask it, is equally relevant whether the taking is trespassory or by a nuisance.[19]

The trial court had instructed the jury that only flights below five hundred feet could be considered in determining if there had been a "taking". The Oregon Supreme Court in discussing this instruction and the requirement that the flights be directly overhead stated:

> If he is in fact ousted from the legitimate enjoyment of his land, it is to him an academic matter that the planes which have ousted him did not fly below 500 ft. The rule adopted by the majority of the state and federal courts is, then, an arbitrary one. . . . It is sterile formality to say that the government takes an easement in private property when it repeatedly sends aircraft directly over the land at

[16] 233 Ore. 396, 376 P.2d 100 (1962).
[17] 306 F.2d 580 (10th Cir. 1962), (dissenting opinion).
[18] RESTATEMENT (SECOND) OF TORTS § 159 (1965).
[19] 233 Ore. at 401, 376 P.2d at 105.

> altitudes so low as to render the land unusable by its owner, but does not take an easement when it sends aircraft a few feet to the right or left of the perpendicular boundaries.[20]

In referring to *Thornburg*, the Oklahoma Supreme Court, in deciding *Henthorn*, stated:

> The Oregon Court in a well reasoned opinion on the theory of nuisance discussed both theories of the plaintiff in light of the 500 foot rule and the boundary line rule, . . . and in much the same way that Judge Murrah reasoned in *Batten*, decided that the main question is not the height above the land or whether it is directly over the land but whether the continuing interference is substantial enough to constitute a taking.[21]

In *Batten v. United States*, the plaintiffs were deluged with smoke, noise and vibrations caused by jets warming up on an adjacent runway. The majority characterized this as mere consequential damages since *Causby* required direct overflights before there could be a taking. Invasions of superadjacent airspace were equated with invasions of the surface and, therefore, a direct physical invasion was required. Judge Murrah, in a vigorous dissent, argued:

> It is true that, in the very nature of things, most constitutional takings are accompanied by actual physical invasion. . . . But, the Government may surely accomplish by indirect interference the equivalent of an outright physical invasion.[22]

The constitutional test, Judge Murrah asserted, is "first, whether the asserted interest is one which the law will protect; if so, whether the interference is sufficiently direct, sufficiently peculiar, and of sufficient magnitude to cause us to conclude that fairness and justice, as between the state and the citizen, requires the burden imposed to be borne by the

[20] 233 Ore. at 405, 376 P.2d at 109.
[21] 453 P.2d at 1015.
[22] 306 F.2d at 586.

public and not by the individual alone."[23] If his colleagues were relying on the fact that the taking was not sufficiently direct, peculiar and grave to justify the finding of a taking, Judge Murrah asked: "[A]t what point the interference rises to the dignity of a 'taking'? Is it when the window glass rattles, or when it falls out; when the smoke suffocates the inhabitants, or merely makes them cough; when the noise makes family conversation difficult, or when it stifles it entirely?"[24]

The Restatement 2d after defining "immediate reaches" as a matter of degree to be determined as a question of fact goes on to state: "Even though the flight is not within the 'immediate reaches' of the airspace, it may still unreasonably interfere with the use and enjoyment of the land. In such case the liability will rest upon the basis of nuisance rather than trespass."[25] The Oklahoma Court said it wasn't necessarily adopting this test, but only used it to illustrate that the question of height is a viable concept in relation to interference with the land.

The physical invasion trespass theory was developed in the propellor age and in this writer's view, this theory has little relevance in the supersonic jet age where we are more concerned with the very real problems of smoke, vibration and noise as opposed to a direct physical invasion. Of course, some inconveniences caused by governmental activity must be borne without compensation, but the *Causby* court could not have anticipated the approaching decibel onslaught which would render a plane's location largely irrevelant in determining the extent of the injury.

The Oklahoma Court is not holding that a landowner may bring a cause of action based on a "repeated nuisance" theory. In *Henthorn,* while there was a direct physical invasion of

[23] *Id.* at 587.
[24] *Id.*
[25] RESTATEMENT (SECOND) OF TORTS, *supra* note 18.

the superadjacent airspace, the jury simply found that there was no interference with the use and enjoyment of the land. The court held that both of these elements were indispensable in order for there to be a "taking" and that it was properly a question for the jury to decide. However, since a considerable part of the opinion discusses the virtues of the nuisance theory of recovery, it would appear that a landowner may, in a future case, successfully allege a taking without the showing of a physical invasion of the superadjacent airspace. The court indicates this possibility when it stated that a landowner must show not only a substantial interference but that the flights were "low, continuous, frequent flights or *in close proximity* to plaintiff's property."[26] (emphasis supplied) It is submitted that Oklahoma may join the small minority of jurisdictions that have rejected the physical invasion concept in the taking of air easements.

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[26] 453 P.2d at 1016. For another case dispensing with the requirement of overflights, *see* Martin v. Port of Seattle, 64 Wash. 2d 309, 391 P.2d 540 (1964), *cert. denied,* 379 U.S. 989 (1965).
[27] 453 P.2d at 1016.